

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 25, 2003

IN RE:

ENFORCEMENT OF INTERCONNECTION  
AGREEMENT BETWEEN BELL SOUTH  
TELECOMMUNICATIONS, INC. AND  
ITC^DELTA COM COMMUNICATIONS, INC.

ENFORCEMENT OF INTERCONNECTION  
AGREEMENT BETWEEN BELL SOUTH  
TELECOMMUNICATIONS, INC. AND XO  
TENNESSEE, INC.

DOCKET NO.  
02-01203

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ORDER DENYING MOTION TO SUSPEND PROCEDURAL SCHEDULE

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This matter came before the Hearing Officer upon the *Motion to Suspend Procedural Schedule* (the "*Motion*") in which ITC^DeltaCom Communications, Inc. ("DeltaCom") and XO Tennessee, Inc. ("XO") request that the procedural schedule in this Docket be suspended pending the issuance of a written order by the Federal Communications Commission ("FCC") in FCC Docket No. CC-01-338 (the "Triennial Review"). For the reasons set forth below, the Hearing Officer denies the *Motion*.

**Background**

On November 5, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed complaints regarding auditing provisions in interconnection agreements between BellSouth and two competing local exchange carriers. The first of these, which involves an interconnection agreement with DeltaCom, was assigned to Docket No. 02-01203. The second, which involves

an interconnection agreement with XO, was assigned to Docket No. 02-01204. At the regularly scheduled Authority Conference held on November 18, 2002, the Chairman of the Authority consolidated these two dockets and assigned the docket filed last in time to the voting panel which was assigned to the first filed docket. This panel comprises Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Ron Jones.

On December 5, 2002, XO filed the *Answer and Counter-Complaint of XO Tennessee, Inc.* and DeltaCom filed the *Answer and Counter-Complaint of ITC^DeltaCom Communications, Inc.* BellSouth filed a response to each counter-complaint on January 6, 2003.

The voting panel considered this matter during the January 27, 2003 Authority Conference. The Directors asked counsel for BellSouth and counsel for XO and DeltaCom whether this matter could be resolved through a "paper hearing." Both attorneys stated that they would like to conduct discovery before informing the Authority on the possibility of a paper hearing. The attorneys agreed to a deadline of February 7, 2003 for filing discovery requests. The attorneys further stated that they would negotiate a deadline for responses to discovery requests and would respond to the Directors' question regarding a paper hearing at the February 18, 2003 Authority Conference. During the January 27, 2003 Authority Conference, the Directors also appointed the General Counsel or his designee to serve as Pre-Hearing Officer to preside over the scheduling of matters prior to the commencement of the hearing.

On February 6, 2003, DeltaCom and XO filed an *Unopposed Motion for Continuance*, in which DeltaCom and XO requested an extension of the deadline for filing discovery requests until February 14, 2003. DeltaCom and XO stated that counsel for BellSouth had no objection to this request. DeltaCom and XO filed discovery requests on February 14, 2003.

### XO and DeltaCom's Motion

In their *Motion*, XO and DeltaCom state:

In the complaint, BellSouth asserts that it has properly exercised its right to demand an audit of extended enhanced loops ("EELs") utilized by the two carriers. The purpose of the audit request is to determine whether those EELs are being used to carry a "significant amount" of local telephone traffic. The FCC has defined a "significant amount" in several ways, giving the CLECs three different "safe harbors" *i.e.*, ways of demonstrating that the EEL is, in fact, carrying significant local traffic. BellSouth's audits will presumably determine whether the EELs used by XO and DeltaCom fall within one of the safe harbors. The parties have each issued extensive discovery requests, due to be answered on March 4, 2003, based on the assumption that these safe harbor provisions as well as the FCC's other orders addressing these issues are still in effect.<sup>1</sup>

The *Motion* continues: "On February 20, 2003, however, the FCC announced that it had changed the rules on the use of EELs and the safe harbor provisions."<sup>2</sup> The *Motion* quotes from what it states is an FCC press release. A copy of this press release, titled "Attachment to Triennial Review Press Release," is attached to the *Motion*. The *Motion* further states:

Unfortunately, the FCC has not yet released its written order explaining in detail how and to what extent the safe harbor provisions are being replaced by "architectural safeguards," what safeguards CLECs will be required to demonstrate and to what extent, if any, these changes will apply retroactively. The written order will also presumably clarify whether BellSouth is required to demonstrate specific "concerns" in order to justify an audit or whether the carrier can demand an audit without any stated justification. Such clarification of existing rules would presumably apply retroactively and, thus, directly affect the position of the parties in this proceeding.

All of these issues are central to the dispute in this litigation. It makes little sense to continue with discovery until the FCC order has been issued and these issues clarified.<sup>3</sup>

On March 4, 2003, the parties filed a *Joint Motion to Postpone Responses to Discovery*, in which the parties request that the filing of responses to discovery be postponed until March 18, 2003, in order to give BellSouth time to respond to the *Motion* filed by XO and DeltaCom.

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<sup>1</sup> *Motion to Suspend Procedural Schedule*, pp. 1-2 (February 26, 2003).

<sup>2</sup> *Id.*, p. 2.

<sup>3</sup> *Id.*

BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Motion to Suspend Procedural Schedule* (the "*Response*") on March 7, 2003. The *Response* states:

BellSouth disagrees that it is necessary to await the [FCC] order in order to resolve the issues in this case.

Under the terms of the Interconnection Agreement negotiated by the parties and approved by the Authority, BellSouth has a clear contractual right to initiate an audit, at its sole expense, of Defendants' records to verify the type of traffic being placed over combinations of loop and transport network elements ("EELs"). There is no need for further delay.<sup>4</sup>

BellSouth requests that in the event the Authority suspends the procedural schedule the Authority put certain protections in place to ensure that the records BellSouth seeks are preserved.

### **Discussion**

During the January 27, 2003 Authority Conference, the parties to these consolidated complaints represented to the Directors that they were willing to proceed with discovery expeditiously. The FCC press release submitted and quoted by XO and DeltaCom gives no indication that changes in the rules will preempt provisions in existing interconnection agreements. It is impossible to determine conclusively to what extent the FCC's Triennial Review Order will affect the resolution of the issues in these cases, or indeed whether the FCC's Order will affect these cases at all. The *Motion* only offers speculation as to the possible effect of the FCC's Order.

In the absence of more compelling reasons, the Pre-Hearing Officer concludes that the Motion should be denied and the parties should proceed with discovery. The Pre-Hearing Officer will, of course, consider arguments concerning the import of the FCC's Order following its release. Should the parties agree that discovery should be suspended pending release of the

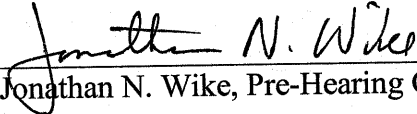
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<sup>4</sup> *BellSouth Telecommunications, Inc.'s Response to Motion to Suspend Procedural Schedule*, p. 1 (March 7, 2003).

FCC's Order, the parties should file a joint motion to suspend the procedural schedule set forth below.

**IT IS THEREFORE ORDERED THAT:**

1. The *Motion to Suspend Procedural Schedule* is denied.
2. Responses to discovery requests shall be served **no later than Thursday, May 1, 2003.**
3. **No later than Monday, May 12, 2003,** the parties shall file comments regarding whether an evidentiary hearing with live testimony is necessary.

  
Jonathan N. Wike, Pre-Hearing Officer